

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
MOBILEMEDIA CORPORATION, et al.)	WT Docket No. 97-115
)	
Applicant for Authorizations and)	
Licensee of Certain Stations in)	
Various Services)	

To: The Commission

**REPLY OF WESTERN WIRELESS CORPORATION
TO THE CONSOLIDATED COMMENTS OF THE
WIRELESS TELECOMMUNICATIONS BUREAU**

Western Wireless Corporation ("Western"), by its attorneys and pursuant to Section 1.106(h) of the Commission's Rules, 47 C.F.R. §1.106(h), hereby replies to the consolidated Comments of the Wireless Telecommunications Bureau ("Bureau") filed July 21, 1997^{1/} in response to Western and various other parties seeking relief from paragraph 18 of the Commission's Order, FCC 97-197 (June 6, 1997) ("Stay Order"), staying the proceeding. In support of this reply, the following is respectfully shown:

I. **THE BUREAU'S REQUEST FOR GUIDANCE UNDERSCORES THE NEED FOR RECONSIDERATION OR CLARIFICATION OF PARAGRAPH 18**

1. In its Comments, the Bureau asks the Commission to articulate a procedure for carrying out the qualification process for potential wrongdoers contained within paragraph 18 of the Stay Order.^{2/} The Bureau acknowledges that third party licensees, such as Western and Triad Cellular

^{1/} See Wireless Telecommunications Bureau's Consolidated Comments On The Petitions of Mark Witsaman, Santo Pittsman, Debra Hilson, Western Wireless Corporation and Triad Cellular Corporation (filed July 21, 1997) ("Comments").

^{2/} Comments at 14.

Corporation ("Triad"), have no direct relationship to the misconduct at issue in the MobileMedia HDO,^{3/4/} and further states that it has a strong interest in minimizing the disruption to the ongoing operations of licensees like Western. Finally, the Bureau states that the Commission has an interest in establishing timely and efficient procedures to process affected applications to prevent undue injury to innocent licensees.^{5/} Obviously, Western strongly shares these views. Continuation of the freeze has already had, and will increasingly have, a very tangible adverse effect on Western's business. But a few examples are: (1) Western's frozen D and E Block PCS applications,^{6/} which are important for filling out the national GSM network; (2) its frozen applications in the Triad acquisition, which are now more than one month past the statutory notice period, and with one exception are uncontested;^{7/} and (3) its frozen cellular and paging applications.^{8/} A resumption of processing of these applications is necessary for the company to continue to operate successfully and provide good public service. The fact that the Bureau has acknowledged both the harm to innocent licensees such as Western in maintaining the status quo and the need for greater clarity lends support to Western's request for clarification or other relief from paragraph 18.

^{3/} See MobileMedia Corporation, Order To Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing For Forfeiture, FCC 97-124 (April 8, 1997) ("HDO").

^{4/} Comments at 14-15.

^{5/} Id.

^{6/} See Memorandum Opinion and Order, DA 97-1345 (Wir. Tel. Bur. June 27, 1997) at 2, n.1.

^{7/} See Public Notice, Report No. LB-97-36, released May 30, 1997; and Public Notice, Report No. 1938, released May 27, 1997. A single RSA transfer application (File No. 02555-CL-AL-1-97) is subject to a petition to deny.

^{8/} Already, the freeze on the processing of routine applications, which has included the rescission of certain grants, has had a detrimental effect on the public and the company.

2. While Western is gratified by the Bureau's sensitivity to its plight and by its concurrence on the need for clarification, it does appear that the Bureau has misconstrued some of Western's legal arguments concerning both the Grayson^{2/} policy and the appropriate criteria to apply in assessing FCC-related misconduct under the Commission's Character Policy Statement.^{10/} Moreover, the Bureau has largely ignored Triad's analysis of Grayson, particularly as it relates to the Commission's commitment to free transferability and accelerated processing of transfers and assignments.^{11/} These items are addressed separately below. As so clarified, Western believes that the Commission should feel comfortable that the relief it seeks is not only well within the bounds of precedent, but protects the agency's interest in enforcement and deterrence.

II. THE GRAYSON POLICY SHOULD GOVERN THE PROCESSING ISSUES RAISED BY PARAGRAPH 18 AND THERE HAS BEEN NO CHANGED CIRCUMSTANCE SINCE RELEASE OF THE MOBILEMEDIA HDQ PLACING WESTERN'S QUALIFICATIONS IN ISSUE

3. Contrary to the Bureau's assertion, neither Western nor Triad has argued that after an order has been released designating only some of a multiple owner's applications or licences for hearing on character grounds, the Commission would "forever lose the right to take action against their other applications or licenses."^{12/} Both Western^{13/} and Triad^{14/} have expressly acknowledged

^{2/} See Grayson Enterprises, Inc., 79 FCC 2d 936 (1980) (as modified by Commission Announces Modification of Grayson Enterprises Policy On Transferability of Broadcast Licenses, 53 Rad. Reg. 2d (P&F) 126 (1983)).

^{10/} Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986) ("Character Policy Statement"), on recon., 1 FCC Rcd 421, appeal dismissed sub nom. National Association of Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987).

^{11/} See Petition For Partial Reconsideration (filed July 7, 1997) ("Triad Petition"), 8-11.

^{12/} Comments at 10.

^{13/} See Emergency Petition For Limited Reconsideration Or Clarification (filed July 3, (continued...))

the Commission's right to take further action if new facts arise regarding a multiple owner's qualifications. "[T]he Grayson policy, by its own terms, does not foreclose consideration of petitions to deny applications to renew, assign, or transfer simply because they are based on allegations pending in another proceeding."^{13/} There must, however, be some changed circumstance raising a substantial and material question of fact that precludes a public interest finding in connection with the multiple owner's ability to transfer or acquire licenses that were not implicated at the time of the initial hearing designation.^{16/} The Commission's initiation of Second Thursday^{17/} procedures did not suddenly raise a substantial and material question of fact regarding Western's qualifications.^{18/}

4. The Bureau's reliance on RKO General Inc., 5 FCC Rcd, 642 (1990) for the proposition that a Grayson analysis may be made after the initial designation of a license for hearing^{19/} is misplaced. In RKO, after there had already been an affirmed adjudication of misconduct by certain new applicants owning no other stations, the applicants themselves asked for a Grayson analysis as part of a settlement of the case so that they could acquire new stations in the future. The

^{13/}(...continued)

1997) ("Emergency Petition") at 13-16, 21-23.

^{14/} See Triad Petition at 15 and n.15.

^{15/} Trinity Broadcasting of Florida, Inc., 9 FCC Rcd 2567, 2568, n.7 (1994).

^{16/} Id. at ¶4, see also Otis L. Hale d/b/a Mobilfone Communications, 1985 FCC LEXIS 2389, at ¶14, and n.14 (1985), and Character Policy Statement at 1225, cf. La Star Cellular Telephone Company, 11 FCC Rcd 1059, 1061 (1996) (after resolving an issue of misconduct, the Commission will not revisit allegations regarding a multiple owner's qualifications in other proceedings unless new facts come to its attention).

^{17/} See Second Thursday Corp., 22 FCC 2d 515 (1970), recon. granted, 25 FCC 2d 112 (1970).

^{18/} Emergency Petition at 4-7, 15-16, 19-20.

^{19/} Comments at 10.

Commission, after acknowledging that a Grayson determination “would not routinely be made in the case of new applicants[,]”^{20/} obliged the parties, because of the unique history of the RKO case.^{21/} The reason the Commission normally refrains from Grayson analyses in the case of new applicants is “because, unlike multiple owners with existing licenses, new applicants have no demonstrable evidence of their ability to perform consistent with Commission rules and policies.”^{22/} Western and Hellman & Friedman, as existing licensees and multiple owners, respectively, do have demonstrable evidence of their ability to so perform and were, therefore, entitled to a Grayson analysis and to know of any restrictions at the time of designation. The facts in RKO were sui generis and the holding therein does not in any way undercut but rather affirms Western’s Grayson analysis.

5. As to the Bureau’s comment that the circumstances of the instant case “do not fit squarely within the typical Grayson analysis[,]”^{23/} Western believes that the differences cited by the Bureau, namely “a different applicant which shares some common principals,”^{24/} only heightens the need for the careful balancing of interests and notice afforded by Grayson. In point of fact, the Commission has applied Grayson analyses to affiliates of licensees designated for hearing,^{25/} and to multiple owners with less than a controlling interest in a licensee.^{26/}

^{20/} RKO General, Inc. at 643.

^{21/} Id. at 643-644.

^{22/} Character Policy Statement at ¶95.

^{23/} Comments at 10.

^{24/} Id. at 11 (emphasis in the original).

^{25/} Trinity Broadcasting of Florida, Inc. at 25-67, n.4.

^{26/} See Cellular System One of Tulsa, 102 FCC 2d 86, 89 ¶7 (1985), see also Emergency Petition at 12, n.27.

6. The Bureau suggests that because Western and MobileMedia are not one and the same licensee, the Commission "properly separated any examination of Western and MobileMedia's qualifications into two separate proceedings."^{27/} This rationale, however, is neither legally correct, as shown above, nor is it consistent with what actually happened. There is no allegation of fact — and the Commission has certainly not articulated any — linking the conduct of any potential wrongdoer with Western's qualifications. The fact is, Western disclosed the two directors it held in common with MobileMedia and the common owner, Hellman & Friedman Capital Partners II, L.P. and certain affiliates also owning stock in Western (collectively "Hellman & Friedman").^{28/} It was only when the Commission decided to permit MobileMedia to pursue a Second Thursday solution that Western suddenly faced a totally unforeseen application freeze. Western was entitled to have its interests carefully balanced under Grayson at the time of the MobileMedia HDO, precisely to avoid such an unfair result.

7. Western does not dispute, as the Bureau suggests, the Commission's discretion to fashion licensing procedures that will best conduce to the dispatch of its business and the ends of justice.^{29/} However, paragraph 18 is not such a procedure. The Grayson policy is. And while the Commission may certainly overrule or limit its prior decisions by advancing a reasoned explanation for the change, it may not blithely cast them aside.^{30/} Paragraph 18 has involved multiple Bureaus in making

^{27/} Comments at 11.

^{28/} See Emergency Petition at 5.

^{29/} Id.

^{30/} See, e.g. Rainbow Broadcasting Co. v. FCC, 949 F.2d 405, 408 (D.C. Cir. 1991), Telecommunications Research & Action Center v. FCC, 800 F.2d 1181, 1184 (D.C. Cir. 1986).

ad hoc qualification decisions, in some cases in connection with the very same party.^{31/}

8. The case of Roy M. Speer, 2 CR 901 (1996), cited by the Bureau, is not apposite to the facts presented here. In Speer the Commission, on its own motion, stayed a grant of consent to a transfer of control because new allegations of fact came to its attention raising serious qualification issues regarding the seller of which it was not aware when it adopted its order granting consent. Here, there are no facts — new or old — suggesting that Western or Triad lacks the qualifications to be a licensee. In the absence of such facts or any facts showing Hellman & Friedman to have control of Western, or linking Hellman & Friedman to any wrongdoing within Western's licensed operations, there is no basis for deferral.^{32/}

III. HELLMAN & FRIEDMAN ARE NOT "INVOLVED IN SUBSIDIARY OPERATIONS" WITHIN THE MEANING OF THE CHARACTER POLICY STATEMENT AND THE COMMISSION DOES LOOK AT THIS FACTOR EVEN WHERE FCC-RELATED MISCONDUCT IS INVOLVED

9. The Bureau contends that Western and Triad have misread the Character Policy Statement by claiming that "any misconduct of [Western's] principals occurring at MobileMedia" is "inapplicable to Western's applications."^{33/} Neither Triad nor Western, however, has taken such an unqualified blanket position. The MobileMedia misconduct is relevant for Section 1.65 purposes because of the possibility that it "may be of decisional significance . . ." 47 C.F.R. §1.65(a). That is why Western reported the matter in its pending applications, including those involved in the Triad acquisition. However, under the Character Policy Statement and relevant precedent construing it,

^{31/} See e.g. Petition For Limited Waiver And For Expedited Qualifications Finding (filed July 23, 1997) of Hellman & Friedman Capital Partners II, L.P. Western supports this request for a consolidated qualification review by the Commission rather than its separate Bureaus. Such review should proceed, however, on a totally independent track from the relief requested by Western.

^{32/} See Emergency Petition, 12, 13 and at n.32.

^{33/} Comments at 12.

unless the alleged wrongdoers control Western or are involved in its subsidiaries' day-to-day operations, processing of Western's applications should not be deferred simply on the basis of common attributable interests. Under the Bureau's formulation, a party is automatically "involved in subsidiary operations" without reference to specific facts if it has a "significant" ownership interest and board seats on the parent company of a licensee.^{34/} That formulation, however, is directly inconsistent with what the Character Policy Statement says — even in the language quoted by the Bureau — and what the Commission has actually done in past cases.

10. First, it should be noted that MobileMedia and Western do not have a parent-subsidary relationship, they are affiliated companies. Second, in every case where there is not a complete identity of interest between an alleged wrongdoer and an affiliated licensee, the analysis is always fact-specific.^{35/} Even if MobileMedia were Western's parent company, under paragraph 81 of the Character Policy Statement, it is clear that the words "also involved in subsidiary operations occurring in the course of their employment" are intended to have meaning.^{36/} The only difference in treatment of such individuals where the misconduct is FCC-related, is that if they are so involved with the subsidiary in the course of their employment, then the Commission will consider the impact of their conduct on the subsidiary regardless of whether or not their interest is attributable.^{37/} The "involvement" test is at least as pertinent, if not more so, where, as here, the company accused of

^{34/} Id. at 13.

^{35/} Character Policy Statement at ¶¶77, 78, 92.

^{36/} "In considering the extent to which the conduct of the corporate parent of an applicant reflects adversely on the applicant's qualifications, the nature of the activity and the degree of the wrongdoer's relationship to the applicant are critical considerations." Westinghouse Broadcasting Corporation, Inc., 75 FCC 2d 736, 739 (1980).

^{37/} Id. at ¶81.

wrongdoing is not the parent of the affiliated licensee and the two companies are not even under common control.^{38/}

11. In applying the Character Policy Statement, even in cases of FCC-related misconduct, the Commission examines whether the employees, directors or shareholders of the controlling parent or of the affiliate charged with wrongdoing are involved in the day-to-day operations of the licensee.^{39/} Hellman & Friedman and Messrs. Bunce and Cohen are not so involved. In the absence of any allegations of fact showing a connection between specific misconduct by principals within MobileMedia to Western or its subsidiaries' operations, Western's applications should be freely processed.^{40/}

IV. CONCLUSION

Western supports the Stay Order's relief to innocent creditors. It only seeks a limited modification or clarification to protect innocent licensees. The affected interests of various parties commenting on the Stay Order are diverse, and it would be difficult to fashion "a one size fits all"

^{38/} Character Policy Statement at ¶82 (as between related subsidiaries of the same parent, FCC-related misconduct will be treated in the same fashion as that involving the parent-subsidary relationship).

^{39/} See Request For Relief from the Imposition of Conditions filed by Telephone and Data Systems Inc., Order, 11 FCC Rcd 6973, 6974, ¶3 (1995) ("TDS Relief From Conditions"); see also Character Policy Statement at ¶78 ("as to both FCC and non-FCC misconduct[,] mitigating factors must be considered on a case-by-case basis"), David A. Bayer, 71 Rad. Reg. 2d (P&F) 308, 312 (1992) (though licensee is responsible for actions of its employees or agents, actual involvement by owners and managers in violative conduct is relevant to mitigation), PCS 2000, L.P., (Notice of Apparent Liability For Forfeiture), 6 CR 250, 256 (applicant held responsible for misrepresentations of officer or director of its general partner where individual was acting as an agent on behalf of the applicant).


^{40/} While Western agrees with Triad that the Commission has shown a consistent commitment to accelerated processing of transfers and assignments (Triad Petition, 8-11), the Commission should not bifurcate its relief to Western. PCS applications (now frozen), which are important to filling out the national GSM network, and routine cellular and paging applications are all vital to the lifeblood of the company.

remedy. Western believes, however, the Commission can vastly simplify its task and serve the public interest by resuming processing for licensees such as itself, where potential wrongdoers in the MobileMedia case neither control the licensees nor are involved in their day-to-day operations.

12. Western, through its subsidiaries, holds more than 500 FCC licenses: 75 cellular, 288 microwave, 40 paging and 102 PCS. Western's subsidiaries have operated facilities in the public interest for several years and Western has an exceptional record of delivering public service promptly,^{41/} and at low cost.^{42/} These factors, coupled with the lack of control or day-to-day involvement by Hellman & Friedman or Messrs. Bunce and Cohen in Western's subsidiary operations, fully warrant an immediate resumption of processing.^{43/} Western respectfully requests that such relief be granted no later than August 8, 1997, after which date the Commissioners recess from formal meetings until after Labor Day.

Respectfully submitted,

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^{41/} See Emergency Petition, 8 at n.16.

^{42/} See Federal Communications Commission, Competition in the Commercial Mobile Radio Services: Second Annual Report (Mar. 25, 1997) at 44-46.

^{43/} See TDS Relief From Conditions, 11 FCC Rcd at 6974.

CERTIFICATE OF SERVICE

I, Jamie C. Whitney, a secretary in the law offices of Gurman, Blask & Freedman, Chartered, do hereby certify that I have on this 30th day of July, 1997, had copies of the foregoing "REPLY OF WESTERN WIRELESS CORPORATION TO THE CONSOLIDATED COMMENTS OF THE WIRELESS TELECOMMUNICATIONS BUREAU" served via first class mail, postage prepaid, upon the following:

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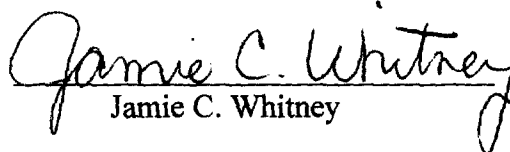
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